Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-03-18 OF 1996

GOPAL SRI RAM, SITI NORMA YAAKOB AND DENIS ONG JJCA

13 JANUARY 1998

Bankruptcy *— Jurisdiction — Jurisdiction of court to summarily direct assessment of damages in favour of debtor — Whether, upon annulment of adjudicating order and rescission of receiving order, a High Court in bankruptcy has power summarily to direct an assessment of damages in favour of the debtor under s 105 of the Bankruptcy Act 1967 — Whether debtor was entitled to an award of damages based on tort of collateral abuse of process — Whether absence of jurisdiction to award such damages amounted to mere irregularity waived by the petitioning creditor's conduct in participating in the inquiry as to damages — Courts of Judicature Act 1964 ss 23 & 24 — Bankruptcy Act 1967 s 105*

Civil Procedure *— Jurisdiction — High Court — Bankruptcy proceedings — Whether, upon annulment of adjudicating order and rescission of receiving order, a High Court in bankruptcy has power summarily to direct an assessment of damages in favour of the debtor — Courts of Judicature Act 1964 ss 23 & 24 — Bankruptcy Act 1967 s 105*

The appellant, as petitioning creditor, instituted bankruptcy proceedings against the respondent which culminated in the making of receiving and adjudicating orders. The respondent took out a motion to set aside these orders. He also asked for other relief, including an order that 'damages be paid by the petitioning creditor to the debtor'. On 19 June 1992, the judge made an order annulling the adjudicating order and rescinding the receiving order and also directed that damages be paid by the appellant to the respondent. Pursuant to the direction for damages, on 22 May 1995, the senior assistant registrar assessed damages at RM2,166,275 to be paid by the appellant to the respondent. The appellant applied to set aside that part of the order that awarded damages to the respondent on the ground that the judge had no jurisdiction to make that order. The judicial commissioner dismissed the appellant's application. The appellant appealed, contending, inter alia, that the power or jurisdiction of the High Court to rescind a receiving order and annul an adjudicating order is contained in s 105 of the Bankruptcy Act 1967 ('the Act') and that s 105 is a complete code which confers no power on a High Court exercising bankruptcy jurisdiction to make the kind of order that was made in this case. The respondent argued, inter alia, that that part of the order which awarded damages to be assessed was not made under the bankruptcy jurisdiction but under the general civil jurisdiction seized of by the High Court. Because of ss 23 and 24 of the Courts of Judicature Act 1964 ('the CJA'), the judge sat not only in bankruptcy but also in general civil jurisdiction. The issue before the court was whether, upon annulment of an adjudicating order and rescission of a receiving order, a High Court

in bankruptcy has power summarily to direct an assessment of damages in favour of the debtor. A

Held, allowing the appeal:

(1) Section 24(c) of the CJA empowers the High Court to deal with the subject matter of bankruptcy. However, the *powers* that it may exercise under that *jurisdiction* must be discovered in the specific legislation enacted by Parliament upon the subject. It is clear from the provisions of s 105 of the Act that while the High Court has subject matter jurisdiction under s 24(c) of the CJA, its powers in relation to the rescinding and annulment of receiving and adjudicating orders respectively, are to be found in s 105 alone. The judge who made the order of 19 June 1992 was not exercising two jurisdictions. He made all the orders in the exercise of his bankruptcy jurisdiction. Section 105 of the Act is a complete code within the framework of which must be found all the powers exercisable by the High Court in bankruptcy jurisdiction when considering an application to discharge adjudicating and receiving orders. It is settled law that bankruptcy jurisdiction is statutory so that the powers of a bankruptcy court are to be discovered from within the terms of the relevant statute. There is absent in the High Court any power to award damages upon making orders under s 105 of the Act. Put another way, a High Court exercising bankruptcy jurisdiction under s 105 of the Act may only make those orders referred to in the five subsections thereunder. It cannot make any other orders. Section 91(1) of the Act, relied upon by the respondent, confers a very limited kind of jurisdiction upon a bankruptcy court. The section certainly does not empower that court to make the kind of order that was made in this case (see pp 432C–I, 433A–C, H and 434C–D, G–I). B C D E F

(2) It is only upon proof of the elements that go to make up the tort of collateral abuse of process that a plaintiff is entitled to an award of damages. What had happened here was that the respondent short-circuited the methodology for obtaining relief. He had, without proving a single element of the tort, obtained damages of more than RM2m. There is no authority that enables such a result to be intended by the law (see p 438F–G). G

(3) The respondent's argument that there had been a mere irregularity waived by the appellant's conduct in participating in the inquiry as to damages was without merit. The absence of a power to make orders is not a mere irregularity; it goes to one aspect of jurisdiction. The word 'jurisdiction' is an expression that must be very carefully used for it draws its colour from its context. In the present case, the High Court had no power to make the order granting damages to the respondent. The acquiescence on the part of the appellant cannot confer power where none exists. It is the same with jurisdiction. Neither consent nor waiver can confer jurisdiction where none exists (see pp 438I and 439A). H I

[Bahasa Malaysia summary

Perayu, sebagai si piutang yang mempetisyen, telah memulakan prosiding kebankrapan terhadap penentang yang berakhir dalam pembuatan perintah penerimaan dan penghukuman. Penentang mengambil usul untuk mengetepikan perintah-perintah ini. Dia juga telah meminta relief lain, termasuk satu perintah bahawa 'ganti rugi harus dibayar oleh si piutang yang mempetisyen kepada penghutang'. Pada 19 Jun 1992, hakim membuat satu perintah membatal perintah penghukuman dan membatal perintah penerimaan dan juga mengarahkan bahawa ganti rugi dibayar oleh perayu kepada penentang. Menurut arahan untuk ganti rugi, pada 22 Mei 1995, penolong kanan pendaftar menaksir ganti rugi pada RM2,166,275 yang harus dibayar oleh perayu kepada penentang. Perayu memohon untuk mengetepikan bahagian perintah yang mengawardkan ganti rugi kepada penentang atas alasan bahawa hakim tidak mempunyai bidang kuasa untuk membuat perintah itu. Pesuruhjaya kehakiman menolak permohonan perayu. Perayu membuat rayuan, dengan menghujahkan, antara lain, bahawa kuasa atau bidang kuasa Mahkamah Tinggi untuk membatalkan satu perintah penerimaan dan perintah penghukuman terangkum dalam s 105 Akta Kebankrapan 1967 ('Akta tersebut') dan bahawa s 105 merupakan satu kanun yang lengkap yang tidak mengurniakan kuasa ke atas sebuah Mahkamah Tinggi yang melaksanakan bidang kuasa kebankrapan untuk membuat jenis perintah yang telah dibuat dalam kes ini. Penentang berhujah, antara lain, bahawa bahagian perintah yang mengaward ganti rugi untuk ditaksir tidaklah dibuat di bawah bidang kuasa kebankrapan tetapi di bawah bidang kuasa sivil umum yang dipunyai oleh Mahkamah Tinggi. Disebabkan ss 23 dan 24 Akta Mahkamah Kehakiman 1964 ('AMK'), hakim bersidang bukan sahaja dalam kebankrapan tetapi juga dalam bidang kuasa sivil umum. Isu di hadapan mahkamah adalah sama ada, pada pembatalan satu perintah penghukuman dan pembatalan perintah penerimaan, dalam hal kebankrapan, sebuah Mahkamah Tinggi mempunyai kuasa terus untuk mengarahkan taksiran ganti rugi memihak kepada penghutang.

Diputuskan, membenarkan rayuan:

(1) Seksyen 24(c) AMK memberi kuasa kepada Mahkamah Tinggi untuk menguruskan hal berkaitan kebankrapan. Namun demikian, *kuasa* yang ia boleh laksanakan di bawah *bidang kuasa* itu mestilah didapati dalam perundangan khusus yang digubalkan oleh Parlimen atas perkara tersebut. Adalah nyata daripada peruntukan s 105 Akta tersebut bahawa sedangkan Mahkamah Tinggi mempunyai bidang kuasa perkara subjek di bawah s 24(c) AMK, kuasa-kuasanya berkaitan dengan pembatalan perintah penerimaan dan penghukuman masing-masing, boleh didapati dalam s 105 sendiri. Hakim yang membuat perintah bertarikh 19 Jun 1992 tidak melaksanakan dua bidang kuasa. Beliau membuat segala perintah dalam pelaksanaan bidang kuasa

kebankrapan. Seksyen 105 Akta tersebut adalah kanun yang lengkap dalam rangka yang mana mesti didapati kesemua kuasa yang boleh dilaksanakan oleh Mahkamah Tinggi dalam bidang kuasa kebankrapan sewaktu mempertimbangkan satu permohonan untuk melepaskan perintah penghukuman dan penerimaan. Adalah undang-undang yang mantap bahawa bidang kuasa kebankrapan adalah statutori supaya kuasa sebuah mahkamah kebankrapan haruslah didapati dalam terma statut yang relevan. Tiada apa-apa kuasa dalam Mahkamah Tinggi untuk mengawardkan ganti rugi ketika membuat perintah di bawah s 105 Akta tersebut. Dalam perkataan lain, sebuah Mahkamah Tinggi yang melaksanakan bidang kuasa kebankrapan di bawah s 105 Akta tersebut hanya boleh membuat perintah-perintah itu yang dirujuk dalam lima subseksyen di bawahnya. Ia tidak boleh membuat apa-apa perintah lain. Seksyen 91(1) Akta tersebut, yang diharapkan oleh penentang, mengurniakan bidang kuasa yang amat terhad kepada sebuah mahkamah kebankrapan. Seksyen tersebut tentu tidak memberi kuasa kepada mahkamah itu untuk membuat jenis perintah yang dibuat dalam kes ini (lihat ms 432C–I, 433A–C, H dan 434C–D, G–I).

(2) Hanya apabila unsur yang membentuk tort penyalahgunaan proses kolateral berjaya dibuktikan barulah plaintif berhak mendapat award ganti rugi. Apa yang telah berlaku di sini adalah bahawa penentang telah memendekkan perkaedahan untuk mendapatkan relief. Tanpa membuktikan sebarang unsur tort, dia telah memperolehi ganti rugi lebih daripada RM2 juta. Tiada autoriti yang memungkinkan keputusan sedemikian dihajatkan oleh undang-undang (lihat ms 438F).

(3) Hujah penentang bahawa terdapat luar aturan semata-mata yang telah diketepikan oleh kelakuan perayu dalam menyertai siasatan mengenai ganti rugi adalah tanpa merit. Ketiadaan kuasa untuk membuat perintah bukanlah luar aturan semata-mata; ia melibatkan satu aspek bidang kuasa. Perkataan 'bidang kuasa' adalah suatu penyataan yang mestilah digunakan secara berhati-hati kerana ia mendapat bayangan kebenaran daripada konteksnya. Dalam kes ini, Mahkamah Tinggi tidak berkuasa untuk membuat perintah memberi ganti rugi kepada penentang. Akuiesens pada pihak perayu tidak boleh mengurniakan kuasa di mana tiada yang wujud. Begitu juga dengan bidang kuasa. Baik izin mahupun pengenepian tidak boleh mengurniakan kuasa di mana tiada yang wujud (lihat ms 438I dan 439A).]

Notes

For cases on the jurisdiction of the court in a bankruptcy matter, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1333–1341.

For cases on the jurisdiction of the High Court, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2151–2173.

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab-Malaysian Finance Bhd [1998] 1 MLJ 393 (refd)
Cameron v Cole (1943) 68 CLR 571 (refd)
Ellis v Silber (1872) LR 8 Ch App 83 (refd)
Goldsmith v Sperrings Ltd & Ors [1977] 1 WLR 478 (refd)
Grainger v Hill (1838) 4 Bing NC 212 (refd)
Hutton, Re, A Bankrupt, ex p Mediterranean Machine Operations Ltd v Haigh & Ors [1969] 1 All ER 936 (refd)
Jones v Pritchard (1849) 6 Dow & L 529 (refd)
Lee Lee Cheng (f) v Seow Peng Kwang [1960] MLJ 1 (refd)
Macdougall v Knight (1890) 25 QBD 1 (refd)
Majory, Re [1955] Ch 600 (refd)
Reynolds, Ex parte; In re Barnett (1884–85) 15 QBD 169 (refd)
Thomas, Re, ex p Inland Revenue Commissioners v Falconer & Ors [1984] 1 WLR 232 (refd)
Williams v Spautz 107 ALR 635 (refd)

Legislation referred to

Bankruptcy Act 1967 ss 91(1), 105
Courts of Judicature Act 1964 ss 23, 24

Appeal from: Bankruptcy No 644 of 1985 (High Court, Kuala Lumpur)

CV Das (*John Matthew* and *Jayanthi Pillai* with him) (*Kadir Tan & Ramli*) for the appellant.
B Thangaraj (*Thangaraj & Associates*) for the respondent.

Gopal Sri Ram JCA (delivering oral judgment): This appeal raises a point of importance touching upon jurisdiction of the High Court in bankruptcy proceedings. At issue is the question whether, upon annulment of an adjudicating order and rescission of a receiving order, a High Court in bankruptcy has power summarily to direct an assessment of damages in favour of the debtor. The matter arose in this way.

On 3 April 1984, the appellant before us obtained judgment in Civil Suit C431 of 1984 for the sum of RM1,475,529.68. It was a judgment in default of appearance. Later, on 4 April 1986, acting on the judgment, the appellant, as petitioning creditor, instituted bankruptcy proceedings against the respondent which culminated in the making of receiving and adjudicating orders on 10 March 1986.

On 20 October 1987, the respondent took out a motion to set aside these orders. He also asked for other relief, including an order that 'damages be paid by the petitioning creditor to the debtor'. On 19 June 1992, the learned judge who heard the respondent's motion granted an order in its terms. Apart from annulling the adjudicating order and rescinding the receiving order, he directed that damages be paid by the appellant to the respondent. No appeal was preferred against this order, which was made

inter partes in the presence of counsel for the appellant and after hearing argument. The appellant's solicitors approved the draft order submitted to them which contained the direction as to the payment of damages.

On 23 March 1995, the respondent's solicitors wrote to the senior assistant registrar of the High Court requesting for a date on which the inquiry as to damages was to be held. A date was assigned and after several adjournments, the assessment took place over a number of days before the registrar. Viva voce evidence was led and written submissions were put in. The appellant in its written submission merely argued that only nominal damages should be given. It was not argued at any stage until then that the order for damages had been made without jurisdiction. On 22 May 1995, the senior assistant registrar assessed damages at RM2,166,275 to be paid by the appellant to the respondent. Each side preferred an appeal to the judge in chambers, the appellant complaining that the award was excessive and the respondent complaining that it was inadequate. Counsel has informed us that these appeals are pending before the High Court awaiting a decision of this court in the present appeal.

On 10 July 1995, the appellant filed a summons in chambers to set aside that part of the order dated 19 June 1992 that awarded damages to the respondent. The ground upon which the application was made was that the judge had no jurisdiction to make that order. The appellant's summons was heard before the learned judicial commissioner who, after hearing arguments, dismissed it on 2 March 1996. It is against that decision that the present appeal has been brought.

When the appeal was called on yesterday, we formed the preliminary view that the High Court lacked the power to do what it did, namely to make a summary award of damages to be assessed. We therefore invited Mr B Thangaraj of counsel for the respondent to address us first and have heard him yesterday and this morning. We then invited Mr Das of counsel for the appellant to present his arguments and afforded Mr Thangaraj an opportunity for further response. Mr Das' arguments in support of the appeal may, I think, be summarized as follows:

(1) The receiving and adjudicating orders dated 10 March 1986 were made by the High Court in exercise of its bankruptcy jurisdiction. So too were the orders made on 19 June 1992 whereby the receiving order was rescinded and the adjudicating order annulled.

(2) The power or jurisdiction — and I use these two expressions interchangeably for present purposes — of the High Court to rescind a receiving order and annul an adjudicating order is contained in s 105 of the Bankruptcy Act 1967 ('the Act'). Section 105 is a complete code. It confers no power on a High Court exercising bankruptcy jurisdiction to make the kind of order that was made in this case.

Mr Thangaraj in opposing the appeal has argued as follows:

(1) There is no doubt that the order which annulled the adjudicating order and rescinded the receiving order was made in exercise of bankruptcy jurisdiction. However, that part of the order which

A awarded damages to be assessed was not made under the bankruptcy jurisdiction but under the general civil jurisdiction seised of by the High Court.

(2) There was ample jurisdiction in the judge to make the order for damages. Because of ss 23 and 24 of the Courts of Judicature Act 1964, the learned judge sat not only in bankruptcy but also in general civil jurisdiction.

(3) At best, the only complaint that might have been made by the appellant was that there was no judgment pursuant to which the assessment was directed. However, this is a mere irregularity not going to jurisdiction.

(4) The appellant had by its conduct waived the irregularity by participating in the inquiry as to damages and by failing to raise any objection at any stage as to the validity of the order. If the appellant was dissatisfied with that part of the order now complained of, it ought to have preferred an appeal.

In order to appreciate these arguments, it is necessary to hearken to the statutory provisions upon which counsel have relied.

I begin with the Courts of Judicature Act 1964, ss 23 and 24 of which reads as follows:

> 23 (1) Subject to the limitation contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where —
>
> (a) the cause of action arose;
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> (b) the defendant or one of several defendants resides or has his place of business;
>
> (c) the facts on which the proceedings are based exist or are alleged to have occurred; or
>
> (d) any land the ownership of which is disputed is situated,
>
> within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.
>
> (2) Without prejudice to the generality of subsection (1), the High Court shall have such jurisdiction as was vested in it immediately prior to Malaysia Day and such other jurisdiction as may be vested in it by any written law in force within its local jurisdiction.
>
> 24 Without prejudice to the generality of section 23 the civil jurisdiction of the High Court shall include —
>
> (a) jurisdiction under any written law relating to divorce and matrimonial causes;
>
> (b) the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981;
>
> (c) jurisdiction under any written law relating to bankruptcy or to companies;

(d) jurisdiction to appoint and control guardians of infants and generally over the person and property of infants; A

(e) jurisdiction to appoint and control guardians and keepers of the person and estates of idiots, mentally disordered persons and persons of unsound mind; and

(f) jurisdiction to grant probates of wills and testaments and letters of administration of the estates of deceased persons leaving property within the territorial jurisdiction of the Court and to alter or revoke such grants. B

The relevant portion of the written law quoted above is s 24(c) which confers bankruptcy jurisdiction upon the High Court. This is what is known as 'subject matter jurisdiction'. In other words, s 24(c) empowers C the High Court to deal with the subject matter of bankruptcy. However, the *powers* that it may exercise under that *jurisdiction* must be discovered in the specific legislation enacted by Parliament upon the subject.

That brings me to the Act, s 105 of which reads as follows:

(1) Where in the opinion of the court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, or where it appears to the court that proceedings are pending in the Republic of Singapore for the distribution of the bankrupt's estate and effects among his creditors under the bankruptcy or insolvency laws of the Republic of Singapore and that the distribution ought to take place in that country, the court may annul the adjudication. D E

(2) Where an adjudication is annulled under this section, all sales and dispositions of property, and payments duly made, and all acts theretofor done by the Official Assignee, or other person acting under his authority, or by the court, shall be valid, but the property of the debtor who was adjudged bankrupt shall vest in such person as the court appoints, or in default of any such appointment revert to the debtor for all his estate or interest therein on such terms and subject to such conditions, if any, as the court declares by order. F

(3) Notice of the order annulling an adjudication shall be forthwith gazetted and published in at least one local paper. G

(4) For the purposes of this section any debt disputed by a debtor shall be considered as paid in full if the debtor enters into a bond, in such sum and with such sureties as the court approves, to pay the amount to be recovered in any proceeding for the recovery of or concerning the debt with costs, and any debt due to a creditor who cannot be found or cannot be identified shall be considered as paid in full if paid into court. H

(5) When the court annuls an adjudication under this section it shall also rescind the receiving order.

It is clear from the foregoing provisions that while the High Court has I subject matter jurisdiction under s 24(c) of the Courts of Judicature Act, its powers in relation to the rescinding and annulment of receiving and adjudicating orders respectively, are to be found in s 105 alone.

Having considered the arguments advanced on both sides, I am not persuaded that the learned judge who made the order of 19 June 1992 was exercising two jurisdictions. I am convinced that he made all the orders of that date in the exercise of his bankruptcy jurisdiction. As I said at the commencement of this judgment, the issue is whether he is empowered to award damages in bankruptcy. There is, in my judgment, much force in the argument of Mr Das that s 105 of the Act is a complete code within the framework of which must be found all the powers exercisable by the High Court in bankruptcy jurisdiction when considering an application to discharge adjudicating and receiving orders. I find Mr Das' submission to be supported by respectable authority.

In *Cameron v Cole* (1943) 68 CLR 571 at p 583, Latham CJ when dealing with the equivalent Australian provision made the following observation:

> Where a composition or scheme of arrangement is approved by the court, a sequestration order may be annulled (s 71(18)). Apart from s 71(18), s 124 contains all the provisions of the Act relating to annulment of sequestration orders. Section 124 is a special provision relating to that subject. The power to annul a sequestration order is given separately from the power conferred by s 26 to review, rescind or vary orders. Section 124, is, as *Baldwin on Bankruptcy and Bills of Sale* (11th Ed, 1915) at p 717 says, with respect to the corresponding English section, 'intended to be a complete code' on the subject of annulment of such orders (*In re Gyll, ex p Board of Trade* (1888) 58 LJQB 8; *In re Burnett, ex p Official Receiver* (1894) 63 LJQB 423; *Ex parte Painter; In re Painter* [1895] 1 QB 85; *In re Izod, ex p Official Receiver* [1898] 1 QB 241. See also *Williams on Bankruptcy* (15th Ed, 1937) at pp 143, 144). The power to order a rehearing, derived from s 26 is not the power which is exercised when the court makes an order of annulment. There is no power to annul a valid sequestration order without observance of what have been described as 'the very careful provisions' which are applicable in the case of an application to annul (*In re A Debtor, ex p Official Receiver* (1937) 106 LJ Ch 225). When an order for sequestration is annulled, the debtor, in respect of his property, is restored to the status quo ante, subject to any order which the court may make under that subsection (See per Cockburn CJ in *Bailey v Johnson* (1872) LR 7 Ex at p 264) — he is remitted to his original situation. Section 124 authorizes an order for annulment, but in my opinion does not authorize a new hearing of a petition, after an order of sequestration made thereon has been annulled under the section, as if the petition were still pending.

It is settled law that bankruptcy jurisdiction is statutory so that the powers of a bankruptcy court are to be discovered from within the terms of the relevant statute. See, *Re Thomas, ex p Inland Revenue Commissioners v Falconer & Ors* [1984] 1 WLR 232; *Ex parte Reynolds; In re Barnett* (1884–85) 15 QBD 169 and *Ellis v Silber* (1872) LR 8 Ch App 83.

Mr Das has also argued that the position is made clearer by an examination of the jurisdictional history of the English bankruptcy court. He has drawn to our attention a passage from the 13th Ed of *William's on Bankruptcy* which reads as follows:

> Under the earlier statutes, the petitioning creditor, on striking the docket, had to give a bond to the Lord Chancellor conditioned for proving his debt and an act of bankruptcy, and to proceed on the commission, which bond might be assigned to the debtor petitioned against; and the statutes of 1849, s 267, and 1861, s 91 provided that the court might order satisfaction to any person aggrieved, if the debt and act of bankruptcy were not proved, and if it appeared that the fiat, or petition, was issued or filed fraudulently or maliciously.

It is significant that the power exercisable by the English bankruptcy court earlier in its history as described in *Williams* in his work is absent in s 105 of the Act.

I am therefore in agreement with Mr Das' submission that there is absent in the High Court in our country, any power to award damages upon making orders under s 105 of the Act. Put another way, a High Court exercising bankruptcy jurisdiction under 105 of the Act may only make those orders referred to in the five subsections thereunder. It cannot make any other orders.

It is axiomatic that a court while having jurisdiction over a particular subject matter may lack power to make certain orders in respect of that subject matter. This dichotomy between jurisdiction and power is well brought out by the judgment of Thomson CJ (as he then was) in *Lee Lee Cheng (f) v Seow Peng Kwang* [1960] MLJ 1.

The authorities cited by Mr Thangaraj in opposition to the view which I favour are, with respect, not relevant. They deal, in the main, with a discretion vested in a bankruptcy court to decide disputed questions of fact necessarily adjunct to the exercise of bankruptcy jurisdiction. See, for example, *Re Hutton, A Bankrupt, ex p Mediterranean Machine Operations Ltd v Haigh & Ors* [1969] 1 All ER 936. Thus, if upon hearing a petition a question arises as to whether the debt is really owed, it is open to the High Court in the exercise of its bankruptcy jurisdiction, to determine that question, or to dismiss, or to stand over, the petition with a direction to the parties to resort to the ordinary civil jurisdiction of the court for the resolution of the dispute. That position is, with respect to Mr Thangaraj, worlds apart from the factual matrix that has arisen in the present appeal.

Section 91(1) of the Act, relied upon by Mr Thangaraj, is also of no assistance to the respondent. That section which reads:

> Subject to this Act, the court, under its jurisdiction in bankruptcy, shall have full power to decide all questions of priorities and all other questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognizance of the court, or which the court deems it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case

confers a very limited kind of jurisdiction upon a bankruptcy court. See, *Ellis v Silber* and *Re Hutton*. In my judgment the section certainly does not empower that court to make the kind of order that was made in this case.

Every person who is aggrieved by some wrong he considers done him is at liberty to invoke the process of the court. Equally may a litigant invoke

A the process to enforce some claim which he perceives he has against another. When however, the process of the court is invoked, not for the genuine purpose of obtaining the relief claimed, but for a collateral purpose, for example, to oppress the defendant, it becomes an abuse of process. Where the court's process is abused, the proceedings complained of may be stayed, or if it is too late to grant a stay, the party injured may bring an action based on the tort of collateral abuse of process.

The position has been neatly summed up by Lord Denning MR in his dissenting judgment in *Goldsmith v Sperrings Ltd & Ors* [1977] 1 WLR 478, where at p 489 he said:

> In a civilized society, legal process is the machinery for keeping and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression: or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer.

Though a dissenting judgment, the principle enunciated by the Master of the Rolls has been accepted as authoritative of what constitutes an abuse of process.

Sometime abuse can be shown by the very steps being taken in the courts. Take some instances from the law of libel. When a man sent a defamatory circular to seven different persons, and the party defamed brought seven different libel actions against the same defendant, one for each publication, all were stayed, save one, Erle J saying:

> [T]he plaintiff has not alleged that any purpose would be obtained by the course he has already adopted, beyond imposing the cost of litigation on the defendant.

See *Jones v Pritchard* (1849) 6 Dow & L 529 at p 530.

Again, where a pamphlet contained two different passages, each defamatory of a man, he brought two separate actions, one for each passage. He failed on the first. The second was stayed, Fry LJ saying: 'Such successive actions ... would be an abuse of the process of the court ...'. See *Macdougall v Knight* (1890) 25 QBD 1 at p 10.

At other times, the abuse can only be shown by extrinsic evidence that the legal process is being used for an improper purpose. On the face of it, in any particular case, the legal process may appear to be entirely proper and correct. What may make it wrongful is the purpose for which it is used. If it is done in order to exert pressure so as to achieve an end which is improper in itself, then it is a wrong known to the law. This appears distinctly from the case which founded this tort. It is *Grainger v Hill* (1838) 4 Bing NC 212; 132 ER 769, which arose out of the old process of capias. The plaintiff recovered damages for abuse of the process. It had been abused because it had been taken, as Tindall CJ said (at p 221 of the report), 'to effect an object not within the scope of process'; and as

Bosanquet J said (at p 224), 'the process was enforced for an ulterior purpose'. A

The same principle is shown in many bankruptcy cases. It was well stated by Lord Evershed MR, delivering the judgment of the English Court of Appeal in *Re Majory* [1955] Ch 600 at pp 623–624:

> The so-called 'rule' in bankruptcy is, in truth, no more than an application of a more general rule that court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court and therefore disqualified from invoking the powers of the court by proceedings he has abused. B C

Because it has been developed on a case by case basis as other common law wrongs have, the tort of abuse of process, since its entry into the law of torts, has undergone change through history. The essential elements of the tort in present day context have been set out in the instructive judgment of the High Court of Australia in *Williams v Spautz* 107 ALR 635. D

There are two passages in the judgment of the seven judges who heard that appeal which I think are worthy of reproduction here. The first is at p 643 of the report and reads as follows:

> In elucidating the principles governing the exercise of the inherent jurisdiction, the courts have had regard to the tort of collateral abuse of process. This cause of action has been recognized in England (*Grainger v Hill* (1838) 132 ER 769; *Gilding v Eyre* (1861) 142 ER 584, and, more recently, *Speed Seal Products Ltd v Paddington* [1985] 1 WLR 1327, at pp 1334-1335 and *Metall & Rohstoff v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 at p 469), the United States (*Prough v Entriken* (1849) 11 Pa 81) and Canada (*Guildford Industries Ltd v Hankinson Services Ltd* (1973) 40 DLR (3d) 398). It was recognized by this court in *Varawa v Howard Smith Co Ltd* (1911) 13 CLR 35 and *Dowling v Colonial Mutual Life Assurance Society Ltd* (1915) 20 CLR 509. E F
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> The tort of collateral abuse of process differs from the older action for malicious prosecution in that the plaintiff who sues for abuse of process need not show: (a) that the initial proceeding has terminated in his or her favour; and (b) want of reasonable and probable cause for institution of the initial proceeding (*Grainger v Hill*). G
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> Central to the tort of abuse of process is the requirement that the party who has instituted proceedings has done so for a purpose or to effect an object beyond that which the legal process offers. The centrality of this element in the tort was recognized in the case which is generally recognized as having established the tort of abuse of process, *Grainger v Hill*. In that case, the defendants lent money to Grainger in September 1836, secured by a mortgage on a ship. The money was to be repaid in September 1837. However, the defendants decided to seek possession of the ship's register before the loan was due to be repaid. When Grainger refused to repay the loan in response to the defendant's threat of arrest, they commenced an action in assumpsit in the King's Bench for recovery of the loan. A writ of capias was issued endorsed for bail pursuant to which the debtor was arrested. H I

When the writ was issued on the instructions of the defendants, the sheriff's officers who served the process on Grainger told him that they had come for the register and that, if he did not deliver it or find bail they would take him into custody. Grainger was imprisoned for 12 hours before he handed over the register. He then sued the defendants in a special action on the case. They sought a non-suit, arguing that it had not been proved that the defendants' action had terminated and that Grainger had not alleged an absence of reasonable and probable cause. These arguments would have prevailed if Grainger's action had been for malicious prosecution or malicious arrest.

The court rejected the notion that the action was in essence an action for malicious prosecution or malicious arrest and held that it was a distinct and independent action for abuse of process. Tindal CJ said (at p 773):

> 'If the course pursued by the defendants is such that there is no precedent of a similar transaction, the plaintiff's remedy is by an action on the case, applicable to such new and special circumstances; and his complaint being that the process of the law has been abused, *to effect an object not within the scope of the process*, it is immaterial whether the suit which that process commenced has been determined or not, or whether or not it was founded on reasonable and probable cause.' (Emphasis added.)

Bosanquet J said (at p 774):

> This is not an action of a malicious arrest or prosecution, or for maliciously doing that which the law allows to be done: the process was enforced for an ulterior purpose; to obtain property by duress to which the defendants had no right. The action is not for maliciously putting process in force, but for maliciously abusing the process of the court.

The second passage is at p 646 of the report and reads:

> The observations of the Privy Council in *King v Henderson* [1898] AC 731 and those of Isaacs J in *Dowling*, to which we referred earlier, represent an attempt to achieve a formulation which keeps the concept of abuse of process within reasonable bounds. *To say that a purpose of a litigant in bringing proceedings which is not within the scope of the proceedings constitutes, without more, an abuse of process might unduly expand the concept.* The purpose of a litigant may be to bring the proceedings to a successful conclusion so as to take advantage of an entitlement or benefit which the law gives the litigant in that event.
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> Thus, to take an example mentioned in argument, an alderman prosecutes another alderman who is a political opponent for failure to disclose a relevant pecuniary interest when voting to approve a contract, intending to secure the opponent's conviction so that he or she will then be disqualified from office as an alderman by reason of that conviction, pursuant to local government legislation regulating the holding of such office. The ultimate purpose of bringing about disqualification is not within the scope of the criminal process instituted by the prosecutor. But the immediate purpose of the prosecutor is within that scope. And the existence of the ultimate purpose cannot constitute an abuse of process when that purpose is to bring about a result for which the law provides in the event that the proceedings terminate in the prosecutor's favour.
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> It is otherwise when the purpose of bringing the proceedings is not to prosecute them to a conclusion but to use them as a means of obtaining

some advantage for which they are not designed (*Re Majory* [1955] Ch 600 at pp 623–624) or some collateral advantage beyond what the law offers (*Goldsmith v Sperrings Ltd* [1977] 1 WLR at pp 498–9; see also *Varawa* (1911) 13 CLR 91). So, in *Dowling*, Isaacs J pointed out that (at p 524):

> '... if, for instance, it had been shown that the Society had simply threatened Dowling that unless he did what they had no right to demand from him, namely, give up certain names, they would proceed to sequestration, and they had proceeded accordingly, there would have been in law an abuse of the process.'

However, because the Society wished to use the process for the very purpose for which it was designed, there was no abuse of process. (Emphasis added.)

In my judgment, the essential elements of the tort of abuse of process are these:

(1) The process complained of must have been initiated;

(2) The purpose for initiating that process must be some purpose other than to obtain genuine redress which the process offers. In other words, the dominant purpose for which the process was invoked must be collateral, that is to say, aimed at producing a result not intended by the invocation of the process; and

(3) The plaintiff must have suffered some damage or injury in consequence.

It is to be stressed that neither malice nor the termination of the proceedings in the plaintiff's favour are necessary elements of the tort. To put it plainly, a plaintiff in an action for abuse of process need not prove that the defendant had invoked the process of the court maliciously. Neither does he have to prove that the proceedings terminated in his favour.

It is only upon proof of the elements that go to make up the tort of collateral abuse of process, that a plaintiff is entitled to an award of damages. What has happened here is that the respondent short-circuited the methodology for obtaining relief. He has without proving a single element of the tort, obtained damages of more than RM2m. I am unaware of any authorities, indeed none have been cited before us, that enables such a result to be intended by the law. To all this, Mr Thangaraj argues that his client would be put to great hardship and will suffer severe prejudice. He says that his client is 75 years old and has already given evidence once and subjected to rigorous cross-examination. He should not be exposed to the hazards of another litigation.

My respectful response to that argument is that the respondent is the author of his own misfortune. Had he followed the correct steps available to him he would not find himself in this position.

Mr Thangaraj's argument that there had been a mere irregularity waived by the appellant's conduct is, in my opinion, without merit. The absence of a power to make orders is not a mere irregularity; it goes to one aspect of jurisdiction. I have often said and I repeat it here, that the word 'jurisdiction' is an expression that must be very carefully used for it draws its colour from its context. In the present case, the High Court had no

power to make the order granting damages to the respondent. The acquiescence on the part of the appellant cannot confer power where none exists. It is the same with jurisdiction. Neither consent nor waiver can confer jurisdiction where none exists. See *Badiaddin bin Mohd Mahidin & Anor v Arab-Malaysian Finance Bhd* [1998] 1 MLJ 393.

After having carefully considered the arguments in this case and for the reasons already given, I am of the opinion that this appeal ought to succeed. The learned judicial commissioner was clearly wrong in refusing to entertain the application of the appellant to set aside that portion of the order of 19 June 1992 directing that damages be paid by the appellant to the respondent.

Before I make the orders on the appeal, I invite my learned sister and my learned brother to give their views.

Siti Norma Yaakob JCA: I concur with the reasons given. I too would allow this appeal.

Denis Ong JCA: I agree with the judgment of my learned brother.

ORDER

The appeal is hereby allowed. The order of the judicial commissioner dated 2 March 1996 is set aside. There shall be an order in terms of the appellant's summons in chambers dated 10 July 1995 except for the prayer as to costs. There shall be no order as to costs of the appeal. The order as to costs in the court below shall stand. The deposit shall be refunded to the appellant.

Appeal allowed.

Reported by Jafisah Jaafar